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No. 75-1667

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

PETER POMPONIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. BORK,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	14
Appendix A	1A
Appendix B	6A
Appendix C	7A
Appendix D	8A

CITATIONS

Cases:

United States v. *Bishop*, 412 U.S. 346	7, 8, 9
United States v. *Hawk*, 497 F. 2d 365, certiorari denied, 419 U.S. 838	8, 10
United States v. *Malinowski*, 472 F. 2d 850, certiorari denied, 411 U.S. 970	11
United States v. *Matosky*, 421 F. 2d 410, certiorari denied, 398 U.S. 904	12
United States v. *McCorkle*, 511 F. 2d 482, certiorari denied, 423 U.S. 826	8, 10
United States v. *Murdock*, 290 U.S. 389	9, 10, 11
United States v. *Pohlman*, 522 F. 2d 974, certiorari denied, January 12, 1976, No. 75-483	8, 9, 10
United States v. *Smith*, 487 F. 2d 329, certiorari denied, 416 U.S. 989	12

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
Sections 7201–7207	9
Section 7206(1)	2, 3, 8

206-191—76——1

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–5A) is reported at 528 F.2d 247.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 6A) was entered on December 16, 1975, and a petition for rehearing, with suggestion for rehearing *en banc*, was denied on March 17, 1976 (App. C, *infra*,

p. 7A). On April 15, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 16, 1976 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a prosecution for willful filing of false income tax returns in violation of 26 U.S.C. 7206(1), the jury must be instructed that "bad purpose or evil motive" is an element of the offense and that "good motive" negates the element of willfulness necessary to support a conviction.

2. Whether the trial court adequately instructed the jury that it was required to consider whether respondents believed in good faith that certain corporate cash advances paid to them were loans and that certain losses claimed on their tax returns belonged to their partnership and not to a corporation.

STATUTE INVOLVED

Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1), provides:

> Any person who—
>
> (1) * * * Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, respondents Peter Pomponio, Paul Pomponio, and Charles J. Piluso were convicted on three counts of willfully making and subscribing false income tax returns for the years 1969 through 1971, in violation of 26 U.S.C. 7206(1) (App. A, *infra*, p. 2A). The evidence established that respondents had collectively understated their taxable income by approximately two and one-half million dollars with respect to those years (Tr. 594–603).[1] Respondents were each sentenced to concurrent three-year prison terms, and a $5,000 fine, on each count (R.A. 101–102; R. 157).[2] The court of appeals held that the trial court's instructions to the jury were erroneous in two separate respects. It reversed the convictions and remanded the case for a new trial (App. A, *infra*, pp. 1A–5A).

1. Respondents Peter and Paul Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia and Northern Virginia. Respondent Charles J.

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[1] "Tr." refers to the transcript of trial proceedings.

[2] "R.A." refers to the combined appendix filed in the court of appeals on behalf of all the respondents; "R." refers to the appendix filed on behalf of respondent Piluso.

Piluso was their attorney (App. A, *infra*, p. 2A). The income tax fraud with which respondents were charged was based upon two allegations: (1) that respondents had improperly treated amounts paid to them by various corporations that they owned or controlled as loans whereas in fact respondents knew them to be taxable dividends; (2) that respondents had improperly deducted certain losses as partnership losses even though they knew that the losses had in fact been incurred not by their partnership but by a corporation (App. A, *infra*, pp. 2A–3A). At trial, respondents took the position that the amounts paid to them by their corporations were not taxable income but loans that they intended to repay at some future date, and that the losses that they had deducted were properly attributable to their partnership (Tr. 976–993, 1018–1039).

2. At the conclusion of the trial, the district court defined the statutory element of willfulness for the jury as follows:[3]

> An act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or to disregard the law.
>
> The Supreme Court has formulated the requirement of willfulness as used in this identical statute as bad faith or evil intent or evil

[3] The district court's instructions are more fully set forth at Appendix D, *infra*, pp. 8A–12A.

> motive and want of justification in view of all the financial circumstances of the taxpayer or knowledge that the taxpayer should have reported more income than he did. [Tr. 1097.]
>
> * * * * *
>
> Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent. [Tr. 1124.]

With respect to the question whether respondents willfully claimed partnership loss deductions that they knew belonged to a corporation, the trial court instructed the jury as follows:

> [F]rom other evidence the Government has shown you that the Virginia Corporation was the record holder of this property, title holder, that they are the ones who had obtained the loan and that they were the ones who were obligated to pay the interest and the loan, that is the corporation, and from this the Government says, first, there never was any partnership in being.
>
> They don't deny, they admit that these four gentlemen were partners, these three gentlemen and Mr. Ginsberg were partners, they don't question that, under the agreement.
>
> They claim that legally and factually this partnership never came into being due to this situation I have just related, the inability to execute it by transferring the property and designating the nominee and proof of this conveyance.

> And, further, the Government says even though it had of [*sic*] been a legitimate transfer of corporate assets to the partnership entity, that it didn't include the losses prior to the creation of the partnership; it could only include losses, if any, that occurred after the partnership came into existence, and, as I say, it never came into existence legally for that reason.
>
> And they claim that these officers, who are the ones—these defendants, who are the ones who put up the Virginia stock as collateral security in escrow, they knew that because they are the ones who put it up, and, therefore, they knew that they couldn't transfer this asset to a partnership, and, therefore, when they couldn't transfer it they couldn't take the benefits of any losses sustained by the partnership in question, and, therefore, they couldn't claim this as a deduction, thereby reducing their gross income for the year in question because by so doing they would know that they were filing a false report of their total gross income.
>
> Now, although, again I want to remind you you are not called upon to pass upon the legality of these various alleged transactions pertaining to this, you are the sole judges of the fact as to whether or not that claimed loss was permitted to be taken by the individuals and thereby reducing their reportable gross income for the year in question and whether they knew it. [Tr. 1115–1117.]

3. The court of appeals reversed and remanded the case for a new trial because it concluded that the trial court's instructions to the jury were erroneous in two respects (App. A, *infra,* pp. 1A–5A). First, the court held that the trial court's charge dealing with respondents' motives (to which respondents took no exception) was improper in the light of this Court's decision in *United States* v. *Bishop,* 412 U.S. 346. The specific portion of the trial court's instructions that the court of appeals identified as error was the trial court's statement to the jury that (Tr. 1124):

> Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

Although the court of appeals acknowledged that this instruction "would have been correct in most criminal trials" (App. A, *infra*, p. 5A), it held that this Court in *Bishop* had indicated "that the statute at hand requires a finding of a bad purpose or evil motive." The court of appeals reasoned that because *Bishop* requires that the good faith of the defendant be considered by the jury in determining whether or not the act charged was done willfully, "excluding good motive from the consideration of the jury in a case for violation of 26 U.S.C. § 7206(1) is inconsistent with *Bishop*" (*ibid.*).

The court of appeals also held that since there was evidence that may have tended to show that respondents might have believed that the funds received from the corporations were loans and that the losses

206-191—76——2

which they deducted on their personal income tax returns were partnership losses, the trial court should have instructed the jury that a good faith belief would negate the element of willfulness necessary to support a conviction (App. A, *infra*, p. 5A).

REASONS FOR GRANTING THE WRIT

In holding that a conviction for willfully filing a false tax return in violation of 26 U.S.C. 7206(1) requires a finding of "bad purpose or evil motive," the decision of the court of appeals conflicts with *United States* v. *Hawk,* 497 F.2d 365 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *McCorkle,* 511 F.2d 482 (C.A. 7) (*enbanc*), certiorari denied, 423 U.S. 826; and *United States* v. *Pohlman,* 522 F.2d 974 (C.A. 8) (*en banc*), certiorari denied, January 12, 1976, No. 75—483.

This Court in *United States* v. *Bishop,* 412 U.S. 346, held that the element of willfulness is the same in all federal tax offenses, whether felonies or misdemeanors. In so holding, the Court observed that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (*id.* at 360). Following the decision in *Bishop*, three courts of appeals have concluded that the government, in prosecuting federal tax offenses, need not prove bad purpose or evil motive in order to establish the element of willfulness. *United States* v. *Hawk, supra; United States* v. *McCorkle, supra;*

United States v. *Pohlman, supra.* It is sufficient in those circuits that the prosecution prove that the proscribed act or omission was committed voluntarily and intentionally, with knowledge of its illegality.

The decision below departs from what had come to be regarded as the settled meaning of the term "willfully" in federal tax offenses. The court of appeals' holding requires the prosecution to prove not only that the defendant voluntarily and intentionally violated a known legal duty but also that he did so with a bad purpose or evil motive beyond that which is already implicit in intentional wrongdoing. Since willfulness is an element of every federal tax offense (see 26 U.S.C. 7201–7207), the question of the showing necessary to establish that element is of the utmost importance to the criminal enforcement of the federal tax laws.

1. The court of appeals read *Bishop* as requiring "a finding of a bad purpose or evil motive" (App. A, *infra*, p. 5A). But while this Court referred in *Bishop* to the "bad faith or evil intent" formulation of *United States* v. *Murdock*, 290 U.S. 389, it did so in a context that made plain its view that the *Murdock* formula was indistinguishable from that of a voluntary and intentional violation of a known duty (412 U.S. at 360):

> The Court * * * has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the re-

> quirement of willfulness as "bad faith or evil intent" * * *, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer" * * *, or knowledge that the taxpayer "should have reported more income than he did." * * *
>
> This longstanding interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes.

In speaking of a single "longstanding interpretation," the Court made clear that the phrase "bad faith or evil intent," as used in *Murdock,* referred to nothing more than the bad purpose or evil motive that necessarily inheres in a voluntary, intentional violation of a known legal duty. Thus, nothing more than proof of intentional wrongdoing is required. See *United States* v. *Hawk, supra,* 497, F.2d at 368; *United States* v. *McCorkle, supra,* 511 F.2d at 485;[4] *United States* v. *Pohlman, supra,* 522 F.2d at 977.[5]

The decision below, however, requires more. Building upon the "bad faith or evil intent" formulation of *Murdock*, the court held that in order to establish willfulness the prosecution must prove that the defendant did not commit the prohibited act or omission out of a "good motive" (App. A, *infra*, p. 5a). But the "bad faith" formulation in *Murdock* did not concern the defendant's motive (*i.e.*, his reasons for acting); it was addressed to his intent or state of mind at the time of the proscribed act (*i.e.*, whether he intentionally and knowingly violated the law).[6] Thus, the court of appeals confused intent, which is at the heart of the concept of willfulness, with motive, which is irrelevant to the traditional criminal standard of willfulness.

Moreover, if, as the court of appeals held, "good motive" were a defense to a criminal tax prosecution, a person who voluntarily and knowingly committed a criminal tax offense might nevertheless avoid conviction by asserting that he acted in order to protest an illegal and immoral war (see *United States* v. *Malinowski,* 472 F.2d 850, 855 (C.A. 3), certiorari denied, 411 U.S. 970); to protest the withholding of

[4] By citing *McCorkle* with a "but see" notation (App. A, *infra*, p. 5a), the court of appeals appears to have recognized that *McCorkle* was in conflict with its decision.

[5] The decision below relied on the panel decision in *Pohlman* (510 F.2d 414) which was reversed by the Eighth Circuit *en banc* (App. A, *infra*, p. 5a). Although the government called the *en banc* decision in *Pohlman* to the attention of the court of appeals in a petition for rehearing, the court of appeals denied the petition (App. C, *infra*, p. 7a).

[6] *Murdock* involved a prosecution for willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give the requested information had been based upon a bona fide, though mistaken, belief that his refusal was justified by his constitutional protection against self-incrimination. Since the scope of that privilege had been uncertain at the time of the defendant's refusal to supply the information, the Court held that he was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was applicable. Thus, if the defendant had such a belief that he was constitutionally protected from complying with the summons, *i.e.*, that if in refusing to comply he was not violating a legal duty, his refusal was not willful.

income tax from the wages of workmen (*United States* v. *Smith,* 487 F.2d 329, 330 (C.A. 9), certiorari denied, 416 U.S. 989); to avoid disclosure of his identity to others (see *United States* v. *Matosky,* 421 F.2d 410, 411 (C.A. 7), certiorari denied, 398 U.S. 904); or to protest a particular government expenditure. However laudable such "motives" might be in particular circumstances, they cannot negate the element of willfulness if the defendant voluntarily and intentionally violated a known legal duty prescribed by the tax statutes.

Thus, after charging the jury that "[a]n act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or to disregard the law" (Tr. 1097), the trial court properly instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime * * * except insofar as evidence of motive may aid determination of state of mind or intent" (Tr. 1124).

2. The court of appeals further erred in holding that the trial court had failed to instruct the jury that it could not convict if it found that respondents reasonably believed that the corporate cash advances made to them were loans or that their claimed loss deductions were attributable to their partnership (App. A, *infra,* p. 5A). Although this issue would not independently warrant review by this Court, this aspect of the trial court's instructions was an independent ground for reversal by the court of appeals. Thus, if the Court grants certiorari with respect to

the first question, consideration of this second issue will obviate the need for a new trial.

The trial court's charge to the jury gave the very instructions that the court of appeals held that it had failed to give. With respect to the corporate advances, the trial court stated (Tr. 1123):

> Now, next if you do find from the evidence that [the corporate advances] were not loans, next you must go one step further, and I told you if you found they were bona fide loans that ends it, if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were withdrawing this money that it was not a loan and that they didn't have any intention to pay it at any definite time or anything.

This instruction was more than sufficient to advise the jury that even if it believed the advances were not loans, it could not convict respondents unless it also determined that the respondents did not in good faith believe the advances to be loans.

Similarly, the trial court's instructions concerning the propriety of respondents' partnership loss deductions adequately advised the jury that it could not convict unless it determined that respondents knew that they were not entitled to take those deductions. The element of knowledge with respect to the partnership losses was included in the following portion of the instructions (Tr. 1116–1117; emphasis supplied):

> And, further the Government says even though it had of [sic] been a legitimate transfer of corporate assets to the partnership entity, that

it didn't include the losses prior to the creation of the partnership * * *.

And [the Government] claim[s] that * * * these defendants * * * *knew that they couldn't transfer this asset to a partnership, and * * * take the benefits of any losses sustained by the partnership in question,* and, therefore, they couldn't claim this as a deduction, thereby reducing their gross income for the year in question because *by so doing they would know that they were filing a false report of their total gross income.*

Now, although, again I want to remind you you are not called upon to pass upon the legality of these various alleged transactions pertaining to this, *you are the sole judges of the fact as to whether or not that claimed loss was permitted to be taken by the individuals* and thereby reducing their reportable gross income for the year in question *and whether they knew it.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
MYRON C. BAUM,
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Assistant to the Solicitor General.
ROBERT E. LINDSAY,
RICHARD B. BUHRMAN,
Attorneys.

MAY 1976.

Appendix A

United States Court of Appeals
for the Fourth Circuit

No. 74–1758

UNITED STATES OF AMERICA, APPELLEE

v.

PETER POMPONIO, PAUL POMPONIO, CHARLES J. PILUSO, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

OREN R. LEWIS, *District Judge*

Argued February 6, 1975

Decided December 16, 1975

Before RUSSELL, FIELD, and WIDENER, *Circuit Judges*

ALBERT J. AHERN, Jr., for Appellant CHARLES J. PILUSO; ALAN Y. COLE (LEE A. SCHULTZMAN; COLE and GRONER; STUART E. SEIGEL and COHEN and URETZ on brief) for Appellants PETER POMPONIO AND PAUL POMPONIO; THOMAS K. MOORE, Assistant United States Attorney (DAVID H. HOPKINS, United States

Attorney, and CHARLES E. BROOKHART, Attorney, Tax Division, United States Department of Justice, on brief) for Appellee.

WIDENER, *Circuit Judge:*

Peter, Paul, and Louis Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia-Northern Virginia area. Charles Piluso was their attorney. The four were originally indicted on September 24, 1973 on several counts of income tax evasion and conspiracy to commit income tax evasion. This indictment was superseded by another grand jury indictment on November 14, 1973 in which they were each indicted on three counts of filing a false income tax return in violation of 26 U.S.C. § 7206(1) and jointly indicted for conspiracy with others to defraud the United States by impeding the ascertainment and collection of income taxes and withholding taxes by various means in violation of 18 U.S.C. § 371. Due to illness, Louis Pomponio was severed from the case and tried separately. Prior to trial, the United States struck from the conspiracy indictment that portion of it dealing with withholding taxes and several of the means alleged to have been used.

The trial commenced on March 19, 1974. After the jury was empaneled and the government made its opening statement, the court severed Count I, the conspiracy count. The defendants were then tried and each was convicted on three counts of filing a false return. From these convictions they appeal.

The income tax fraud alleged was principally based on two allegations: (1) the various corporations owned or controlled by the defendants would list as loans amounts paid to the defendants, which amounts were actually income taxable to the defendants; (2)

the defendants deducted losses attributed to a partnership which actually did not have the losses to attribute to the partners because such losses were actually those of a corporation.

The defendants allege numerous errors, including several involving the jury instructions. We are of opinion that the court's instruction as to motive was incorrect as used in the case before us, and that it erred in refusing to give a requested instruction on good faith belief of the defendants as to the nature of the loans especially and the deductibility of the partners losses. We express no opinion on the other issues raised, but their very numbers may indicate that many of them are patently without merit.

The offense charged was that the defendants "willfully" made and subscribed income tax returns to be filed with the Internal Revenue Service, which were verified by written declarations made under penalties of perjury, and which the defendants did "not believe to be true and correct as to every material matter," in violation of 26 U.S.C. § 7206(1). The disputed instructions turn on the meaning of the word willfully.

The Supreme Court recently dealt with the meaning of willfully in 26 U.S.C. § 7206. *United States* v. *Bishop,* 412 U.S. 346 (1973), involved a dispute as to whether willfully meant the same in 26 U.S.C. § 7207, a misdemeanor statute, as it did in 26 U.S.C. § 7206, a felony statute. The court held that the meaning was the same in both and went on to clarify and reaffirm its earlier interpretation of willfully as "the bad purpose or evil motive described in *Murdock* [v. *United States,* 290 U.S. 289 (1933)]". *Bishop* at p. 361. See also *Spies* v. *United States,* 317 U.S. 492 (1943).

Murdock involved a willful failure to supply information to the revenue service. The court held that

willful, when used in a criminal statute, ". . . generally means an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversely . . . the word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act. . . ." *Murdock* at 394 (Citations omitted). In connection with finding a willful failure to observe the directions of a statute as to furnishing information to the revenue service, the court stated the defendant had a right to have the "absence of evil motive submitted to the jury," *Murdock* at 396, and the jury might acquit if it found the refusal to furnish the information was "not prompted by bad faith or evil intent." The *Murdock* court approved a reversal of a conviction because the defendant was refused a jury charge that they should consider whether the defendant's refusal to supply information was in "good faith and based upon his actual belief" in considering whether the refusal was "willful." See *Murdock,* p. 393, for the form of the instruction.

In the case at hand, the district court gave detailed instructions as to the meanings of intent and motive. Motive was described as "what prompts one person to act or fail to act," while intent "refers only to the state of mind with which the act is done or omitted." The court then went on:

> "Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent."

In light of *United States* v. *Bishop,* this instruction was improperly used here. Although the instruction was given to explain the difference between intent

and motive, and would have been correct in most criminal trials, the Supreme Court indicated in *Bishop* that the statute at hand requires a finding of a bad purpose or evil motive. Since good faith is required by *Murdock,* as referred to in *Bishop,* to be considered by the jury in determining whether or not the act charged was done willfully, excluding good motive from the consideration of the jury in a case for violation of 26 U.S.C. § 7206(1) is inconsistent with *Bishop.* We note that in a considered *dictum* we have stated that, in a discussion of "willfully" under the same series of statutes, "[i]t is possible that purpose and motivation may be found by a jury to negate willfulness." *United States* v. *Snider,* 502 F.2d 645, 657, (4th Cir. 1974). Accord, *United States* v. *Pohlman,* 510 F.2d 414 (8th Cir. 1975); but see *United States* v. *McCorkle,* 511 F.2d 482 (7th Cir. 1975).

The district court gave full and complete instructions to the effect that the jury could convict only if it found that the defendants had signed the returns knowing them to be false. However, since there was evidence which may have tended to show that the defendants might have believed the payments to be loans, they were entitled to an instruction on that point. *United States* v. *Mitchell,* 495 F.2d 285 (4th Cir. 1974). The same reasoning applies to the claimed losses on account of the partnership. Since a good faith belief would tend to negate the elements of willfulness and knowledge, they were entitled to an instruction similar to that described in *Murdock* v. *United States,* 290 U.S. 389, 393 (1933), and they were entitled to have good motive not excluded from jury consideration.

Reversed and remanded for a new trial.

APPENDIX B

Judgment

United States Court of Appeals for the Fourth Circuit

No. 74-1758

UNITED STATES OF AMERICA, APPELLEE

v.

PETER POMPONIO, PAUL POMPONIO, and CHARLES J. PILUSO, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia

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This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed and remanded for a new trial. The judgment is reversed, the case is remanded to the United States District Court for the Eastern District of Virginia at Alexandria.

/s/ WILLIAM K. SLATE II,
Clerk.

Filed December 16, 1975

APPENDIX C

United States Court of Appeals for the Fourth Circuit

No. 74-1758

UNITED STATES OF AMERICA, APPELLEE

v.

PETER POMPONIO, PAUL POMPONIO, and CHARLES J. PILUSO, APPELLANTS

Order

No request for a poll of the court having been made, rehearing en banc is denied.

On petition for rehearing, we have had called to our attention that the panel opinion in *United States* v. *Pohlman*, 510 F.2d 414 (8th Cir. 1975), was overturned by an en banc decision, 522 F.2d 974 (8th Cir. 1975), with three judges dissenting from the en banc decision.

We have considered *Pohlman*, the petition for rehearing, and the authorities cited therein, and are of opinion the petition for rehearing is without merit.

It is accordingly *Adjudged* and *Ordered* that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Field.

/s/ H. EMORY WIDENER, JR.,
For the Court.

A True Copy, Teste:

WILLIAM K. SLATE II,
Clerk,
By E. BELTON, *Deputy Clerk.*

Filed March 17, 1976

APPENDIX D

Excerpts From the Trial Court's Instructions to the Jury:

> The internal revenue laws of the United States further provide that any person who willfully makes and subscribes any return, statement or other document, and here we are referring to the tax return that I just mentioned, which contains or is verified by a written declaration that it is made under the penalties of perjury, which he does not believe to be true and correct as to every material matter therein, shall be punished as the law provides.
>
> Now, you will note from what I have just read, which is an exact reading of the statutory section under which these defendants stand accused, that it refers to the word "false," it uses the word "willfully" make and subscribe, and subscribe merely means to sign it under these penalties, to make means to fill it out or cause it to be filled out, and willfully prescribes that it must be willfully made, willfully subscribed to and the maker does not believe the statement that he has just made and subscribed to be true and correct as to every material.
>
> Now, the word "false," as here used, means, in other words, a statement or a return is false if it was untrue when made and was then known to be untrue by the person making it.
>
> An act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or to disregard the law.
>
> The Supreme Court has formulated the requirement of willfulness as used in this identical statute as bad faith or evil intent or evil motive and want of justification in view of all the financial circumstances of the taxpayer or knowledge that the taxpayer should have reported more income than he did.
>
> An act or omission, a failure to act is knowingly done as that word is used here if done voluntarily and intentionally and not because of a mistake or an accident or from some other innocent reason.
>
> The purpose of adding the word "knowingly" as [*sic*] to insure that no one would be convicted for an act done because of a mistake or because of an accident or from some other innocent reason.
>
> And, as I have heretofore told you, with respect to an offense such as charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction. [Tr. 1096–1098.]

* * * * *

> Now, ladies and gentlemen, if you find, I will tell you now, if you find that these transactions in fact constituted bona fide loan[s] you just don't need to go any further, and that ends it.
>
> To the contrary, as I told you, if you find, taking into consideration all of the evidence, that they were not bona fide loans, then under the law as given to you you may find that they were includable under the gross income. [Tr. 1121.]

* * * * *

> Now, next if you do find from the evidence that they were not loans, next you must go one step further, and I told you if you found they were bona fide loans that ends it, if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were with-

drawing this money that it was not a loan and that they didn't have any intention to pay it at any definite time or anything.

In other words, you should determine whether they knew that, and, as I have told you, that is an essential element. Even though it was false, it must be done willfully, that is, the return must be made willfully and with the specific intent and knowledge at the time they made it that it was in fact a false return.

Now, intent and knowledge is a state of mind. As I have told you, specific intent, as the term used here, means more than the general intent to commit the crime.

To establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent and motive, however, should never be confused.

Motive is what prompts one person to act or fail to act.

Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent. [Tr. 1123–1124.]

* * * * *

[F]rom other evidence the Government has shown you that the Virginia Corporation was

the record holder of this property, title holder, that they are the ones who had obtained the loan and that they were the ones who were obligated to pay the interest and the loan, that is the corporation, and from this the Government says, first, there never was any partnership in being.

They don't deny, they admit that these four gentlemen were partners, these three gentlemen and Mr. Ginsberg were partners, they don't question that, under the agreement.

They claim that legally and factually this partnership never came into being due to this situation I have just related, the inability to execute it by transferring the property and designating the nominee and proof of this conveyance.

And, further, the Government says even though it had of [*sic*] been a legitimate transfer of corporate assets to the partnership entity, that it didn't include the losses prior to the creation of the partnership; it could only include losses, if any, that occurred after the partnership came into existence, and, as I say, it never came into existence legally for that reason.

And they claim that these officers, who are the ones—these defendants, who are the ones who put up the Virginia stock as collateral security in escrow, they knew that because they are the ones who put it up, and, therefore, they knew that they couldn't transfer this asset to a partnership, and, therefore, when they couldn't transfer it they couldn't take the benefits of any losses sustained by the partnership in question, and, therefore, they couldn't claim this as a deduction thereby reducing their gross income for the year in question because by so doing they would know that they were filing a false report of their total gross income.

Now, although, again I want to remind you you are not called upon to pass upon the legality of these various alleged transactions pertaining to this, you are the sole judges of the fact as to whether or not that claimed loss was permitted to be taken by the individuals and thereby reducing their reportable gross income for the year in question and whether they knew it. [Tr. 1115–1117.]

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